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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG, and EDWIN SHIMODA,
Petitioners,

V.

DELBERT KAAHANUI WAKINEKONA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Amicus Brief of the Commonwealth of Massachusetts and sister States *

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INTEREST OF AMICI

In Wakinekona v. Olim, 664 F.2d 708, (9th Cir. 1981) the Ninth Circuit Court of Appeals held that state prison regulations setting forth procedural rules governing interstate prison transfers in the State of Hawaii created a liberty interest protected by the Due Process Clause of the United States Constitution despite the absence of any substantive limitation on the decision-maker's absolute authority to order such transfers pursuant to state law. In so holding, the court expressly stated that it disagreed with the First, Second, and Sixth Circuits which had previously rejected similar claims and held that procedures mandated by particular prison transfer regulations did not create a liberty interest protected by the Due Process Clause.

664 F.2d at 711. [citing Lombardo v. Meachum, 548 F.2d 13, 15 (1st Cir. 1977); Cofone v. Manson, 594 F.2d 934, 938 (2nd Cir. 1979); and Bills v. Henderson, 631 F.2d 1287, 1298-99 (6th Cir. 1980)]. Because the procedural regulations in question in this case are virtually identical to the Massachusetts procedural regulations considered by the First Circuit Court of Appeals in Lombardo v. Meachum, supra, the Commonwealth of Massachusetts has an acute interest in supporting the state of Hawaii and seeking reversal of the Ninth Circuit's decision. We would also point out that the decision of the district court which was reversed by the Ninth Circuit was based primarily on Lombardo v. Meachum, supra. See Wakinekona v. Olim, 459 F.Supp. 473, 475, 476 (D. Hawaii, 1978).

SUMMARY OF ARGUMENT

1. The Ninth Circuit Court of Appeals misapplied Meachum v. Fano, 427 U.S. 215 (1976) and Montanye v. Haymes, 427 U.S. 236 (1976) in holding that Hawaii prison regulations governing inmate classification created a liberty interest protected by the Due Process Clause in the absence of a substantive limitation on the decision-maker's unfettered discretion to order transfers and classify inmates pursuant to state law.

2. The Due Process Clause of the United States Constitution does not guarantee that an agency will strictly adhere to all of its procedural rules. While such

adherence is desirable, every deviation from state procedures cannot be considered a federal constitution violation cognizable in a civil rights action. Such a holding would dangerously and unnecessarily make a large volume of state proceedings arising not only in the prison setting, but also all administrative and judicial proceedings which are governed by procedural rules subject to complaint in federal district court on due process grounds. See Bills v. Henderson, 631 F.2d 1287, 1289 (6th Cir. 1980). Moreover, a similar claim previously has been rejected by this Court in the context of a student's academic dismissal. Board of Curators of the University of Missouri, et al v. Horowitz, 435 U.S. 91, 93 (1978).

3. To the extent this Court holds that compliance with state procedural rules is constitutionally mandated, a distinction must be drawn between rules which are adjudicatory and those which are investigative. See, United States v. Caceres, 440 U.S. 744 (1979).

4. A federal court must accept the interpretation of a state regulation by the highest court of the state unless it is unreasonable. Bishop v. Wood, 426 U.S. 341 (1976). In this case, the lower court erred in declining to accept the construction of the state regulation in question by the Supreme Court of Hawaii in the absence of a finding of unreasonableness.

ARGUMENT

A. THE COURT OF APPEALS FOR THE NINTH CIRCUIT MISAPPLIED MEACHUM V. FANO, 427 U.S. 215 (1976) AND MONTANYE V. HAYMES, 427 U.S. 236 (1976).

The instant controversy stems from a civil rights action filed in the United States District Court for the District of Hawaii by a state prisoner who had been transferred from a state prison in Hawaii to a mainland prison in California allegedly in violation of state prison classification regulations governing interstate transfers. The inmate, Delbert Kaahanui Wakinekona, claimed that his transfer violated the Due Process Clause of the United States Constitution because the committee which recommended his transfer was biased against him. Specifically, he alleged that the committee was composed of the same persons who initiated the transfer

proceedings in direct violation of Hawaii prison regulations.[1/] Wakinekona v. Olim, 664 F.2d 708, 709 (9th Cir. 1981). The district court dismissed the complaint but the Ninth Circuit Court of Appeals reversed.

The procedural history of this case reveals that the district court had the unique opportunity to consider twice the appropriateness of dismissal. Initially, in a Memorandum and Order

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1/ The provision of the Hawaii prison classification regulations relied upon by Wakinekona provides the following:

> The facility administrator shall establish an impartial Program Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee

dated October 1, 1976, the district court, relying on this Court's decision in Wolff v. McDonnell, 418 U.S. 539 (1974), held that Wakinekona's classification hearing violated his right to due process. Wakinekona v. Olim, 459 F.Supp. 473, 475 (D. Hawaii, 1978). Subsequently, however, relying on Meachum v. Fano, 427 U.S. 215 (1976) as interpreted by the First Circuit Court of Appeals in Lombardo v. Meachum, 548 F.2d 13 (1st Cir. 1977), which had been decided in the interim on almost identical facts, the court reversed itself and dismissed Wakinekona's action stating:

> "The pertinent Hawaii State regulations do not contain standards governing the administrator's exercise of such discretion. Indeed the regulations reserve in the administrator, "as the final decision-maker," the right to affirm or reverse, wholly or partially, the recommendation

> of the Program Committee. Since Wakinekona's transfer did not implicate a constitutionally-protected "liberty interest," due process did not attach. The First Claim for Relief alleging a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution must therefore be dismissed." Wakinekona v. Olim, supra, 459 F.Supp at 476.

On appeal, the Ninth Circuit Court of Appeals, reversed:

> "In our view, these regulations create a justifiable expectation that a prisoner will not be transferred absent specified procedures. They consequently give rise to a constitutionally protected liberty interest." Wakinekona v. Olim, supra, 664 F.2d at 711, 712.

This holding was error.

The Due Process Clause of the Constitution of the United States prohibits a state from depriving a person of life, liberty or property without due process of law. Greenholtz v. Inmates of Nebraska Penal and

Correctional Complex, 442 U.S. 1 (1979); Meachum v. Fano, 427 U.S. 215, 223 (1976). Accordingly, when there is a claimed denial of due process, a court must inquire into the nature of the individual's claimed interest:

> "To determine whether due process requirements apply in the first place, a court must not look to the "weight" but to the nature of the interest at stake. Board of Regents v. Roth, 408 U.S. 564, 570-571 (1972). This has meant that to obtain a protectible right, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement to it." Greenholtz v. Nebraska Penal and Correctional Complex, supra at 7.

This Court has already had occasion to apply this principle of Constitutional law to various aspects of state prison administration and in

particular, to the subject of prison transfers.[2/] In Meachum v. Fano, it was held that the Due Process Clause of its own force did not entitle a duly convicted state prisoner to a fact-finding hearing when he is transferred from one prison to another, the conditions of which are substantially less favorable to him, absent a state law conditioning such transfers on proof of misconduct or other specified events. Since Meachum involved issues almost identical to

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2/ As applied to other areas of prison administration, see for example Wolff v. McDonnell, 418 U.S. 539 (1974) (the imposition of isolation and the loss of statutory good time must comport with procedural due process); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation); Greenholtz v. Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) (state statute making parole mandatory unless certain facts existed required parole decisions to comply with procedural due process).

those in the instant controversy, a detailed discussion of the case is appropriate.

In Meachum, several Massachusetts state prison inmates had brought an action under 42 U.S.C. §1983 alleging that they had been denied due process of law since prison officials had ordered them transferred from a medium security institution to a maximum security institution having substantially less favorable conditions without an adequate fact-finding hearing. Meachum v. Fano, supra at 222. Both the District Court and the First Circuit Court of Appeals agreed, holding that the inmate's due process rights were violated. On writ of certiorari to the Supreme Court of the United States, however, those decisions were reversed.

This Court first rejected outright the notion that any "grievous loss" visited upon a person by the State is sufficient to invoke the procedural protection of the Due Process Clause:

> "We cannot agree that any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. The Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause. But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution...." To hold as we are urged to do that <u>any</u> substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would

> subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts. Meachum v. Fano, supra at 224.

The Court continued:

> "Transfers between institutions, for example, are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate. Yet under the approach urged here, any transfer, for whatever reason, would require a hearing as long as it could be said that the transfer would place the prisoner in substantially more burdensome conditions that he had been experiencing. We are unwilling to go so far. Thus it is clear that the Due Process Clause of its own force does not mandate a pre-transfer hearing even when a grievous loss is involved. Id., at 224, 225. See also Montanye v. Haymes, 427 U.S. 236 (1976).

This Court also rejected the inmate's claim of entitlement based on state law. While acknowledging that as a general principle, a prisoner's transfer may infringe a Due Process Clause liberty interest where there exists "some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events," the Court, upon examining Massachusetts law governing inter-institutional transfers found no such right:

> "Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct. Insofar as we are advised, transfers between Massachusetts prisons are not conditioned upon the occurrence of specified events. On the contrary,

> transfer in a wide variety of circumstances is vested in prison officials. The predicate for invoking the protection of the Fourteenth Amendment as construed and applied in Wolff v. McDonnell is totally nonexistent in this case." Meachum v. Fano, supra at 226, 227.

Significantly, the Massachusetts statute governing inter-institutional transfers within the state vested absolute discretion in the Commissioner of the Department of Correction to transfer an inmate from one institution to another for any reason or for no reason at all.[3/]

While Meachum and Montanye go a long way toward resolving the question involved in this controversy, those cases do not purport to contain the last

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3/ M.G.L. c.127, §97 provided, inter alia,:

> The commissioner may transfer any sentenced prisoner from one correctional institution of the Commonwealth to another...

word on the due process ramifications of prison transfers. Lombardo v. Meachum, supra, 548 F.2d at 15. Indeed, there are differences between the facts in those cases and the facts underlying the instant controversy. For example, Meachum and Montanye both were concerned only with an alleged liberty interest arising out of state law, not one that purportedly derives from a state regulation. Also, those cases involved only intra-state as opposed to inter-state transfers. Nevertheless, Meachum and Montanye must be construed as establishing the only backdrop against which a court should assess the adequacy of an allegation concerning the existence of a state created liberty interest and corresponding denial of due process. Moreover, the aforementioned factual distinctions are of little or no

significance in terms of applying the due process analysis.

Massachusetts does not contend that state regulations can never give rise to a protected liberty interest. Such a position is clearly untenable in view of this Court's decisions in Meachum v. Fano, supra at 229; Greenholtz v. Nebraska Penal and Correctional Complex, supra and Perry v. Sindermann, 408 U.S. 593, 597 (1972). We do submit, however, that in analyzing the question whether a particular regulation supports a protected liberty interest, a distinction must be drawn between regulations that are substantive and those which are merely procedural. Lombardo v. Meachum, supra; Sisbarro v. Warden, Massachusetts State Penitentiary,592 F.2d 1 (1st Cir. 1979) Cofone v. Manson, 594 F.2d 934, 937, 938(2nd Cir. 1979); Pugliese v. Nelson,

617 F.2d 916, 924, 925 (2nd Cir. 1980); Bills v. Henderson, 446 F.Supp. 967, 974 (E.D. Tenn 1978), aff'd 631 F.2d 1287, 1298-99 (6th Cir. 1980). Due process rights would clearly attach to the former but not to the latter. It is in this regard that the Ninth Circuit Court of Appeals misapplied the due process calculus.

The Court of Appeals for the Ninth Circuit held that the Hawaii prison regulations created a justifiable expectation that a prison transfer involving a "grievous loss" would not be carried out unless certain procedures are followed.[4/] Wakinekona v. Olim,

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4/ The Hawaii classification regulations in question provide for a hearing before an impartial Program Committee when a transfer involves a "grievous loss" to the inmate. The regulations also characterize a grievous loss as an interstate transfer such as

(footnote continued)

supra 664 F.2d at 711. It then observed that the regulations were not without substantive content:

> "...their clear import is that a transfer will not be carried out absent a hearing directed to proof of the facts alleged in notice received beforehand by the prisoner. In our view, these regulations create a justifiable expectation that a prisoner will not be transferred absent the specified procedures. They consequently give rise to a constitutionally protected liberty interest." Id. at 711, 712.

While the precise reasoning underlying the court's finding of a constitutionally protected liberty

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(footnote continued)

the one Wakinekona was subjected to in the instant controversy. Nevertheless, the Court of Appeals for the Ninth Circuit, quite correctly, did not find the existence of this language alone sufficient to establish a state created liberty interest. Rather, the court held that the procedural rules themselves were a Constitutionally protected liberty interest. Wakinekona v. Olim, supra 664 F.2d at 711, 712.

interest in the Hawaii regulations is somewhat unclear, its conclusion cannot be supported under any theory. To the extent the Ninth Circuit might have relied on the existence of the "grievous loss" language, the decision cannot be sustained, for in Meachum v. Fano, supra and Montanye v. Haymes, supra, this Court expressly rejected the "grievous loss" approach to questions of procedural due process in prison transfer cases. In those cases, it was established that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the

occurrence of other specified events. Montanye v. Haymes, supra, at 242. See also, Sisbarro v. Warden, Massachusetts State Penitentiary, 592 F.2d 1, 3 (1st Cir. 1979).

It might also be that the Ninth Circuit was of the opinion that the regulations, although admittedly procedural in nature, placed substantive restrictions on the decision maker's otherwise unfettered discretion to order a transfer.5/

5/ This precise question was left unanswered by the First Circuit Court of Appeals in Lombardo v. Meachum, supra. There, the court stated:/ We do not regard it as inconceivable that substantive protections could be inferred from the existence of procedural safeguards but where, as here, the practice is that there are no limitations on the administrator's discretion in those matters, we see no basis for doing so. Id., at 16. See also, Bills v. Henderson, 446 F.Supp. 967, 974 (E.D. Tenn. 1978), aff'd 631 F.2d 1287 (6th Cir. 1980).

This approach, however, would also be erroneous since it involves a misreading of the pertinent regulation.

The authority by which an Hawaii inmate is transferred from a local state prison in Hawaii to a mainland prison in California is contained in Section 353-18 of the Hawaii Revised Statutes which provides:

> §353-18 Transfer of prisoner to federal institution. The director of social services shall, with the approval of the governor, effect the transfer of a state prisoner to any federal correctional institution for imprisonment, subsistence, care and proper employment of such a prisoner.

This statute clearly empowers the Director of Social Services to transfer without limitation an Hawaii prisoner from a state prison to federal penitentiary. Wakinekona v. Olim,

supra, 664 F.2d at 713, (Goodwin, J., dissenting).[6/]

In addition to this statutory provision, there exist certain unrelated Hawaii prison regulations concerning inmate classification. The stated nature and purpose of those regulations is contained in a preamble:

> THE CLASSIFICATION PROCESS
>
> 1. General:
>
> "An inmate's/ward's classification determines where he is best situated within the Corrections Division. Rather than being concerned with isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other

6/ In this case, it appears that Wakinekona was transferred from an Hawaii state prison to another state penitentiary. Whether the applicable statute authorizes such interstate transfers as opposed to inter-system transfers does not appear to be an issue in this case.

> inmates/wards, the exigencies of the community, and any other relevant factors. It never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division."

According to the express terms of the classification rules, a pretransfer hearing must be held before an "impartial program committee" if a change in the prisoner's classification will cause the prisoner a "grievous loss". The committee, however, is enpowered only to make a recommendation and the facility administrator is expressly permitted to

disregard the judgment of the program committee for any reason or for no reason at all.

A literal reading of these rules, as it is not alleged that in practice the rules are applied any differently, makes it most difficult to understand how these regulations can be deemed to create a substantive limitation on the decision-maker's otherwise unfettered discretion to transfer prisoners within his custody, power and control. The classification regulations simply do not disturb the decision-maker's absolute discretion to make an interstate transfer nor do they limit his discretion to change a prisoner's classification. Pugliese v. Nelson, supra, 617 F.2d 916 (2nd Cir. 1980). At most, the regulations are designed to furnish the decision-maker with

information to assist him in making an informed decision as to the classification that is most suitable to the needs of the inmate, the facility and society. Meachum v. Fano, supra at 225. As this Court noted in a slightly different context, it is not surprising therefore, that unlike prison discipline, parole revocation and probation revocation, there is no prescribed or defined combination of facts which if shown would mandate placement in one particular institution or another. Greenholtz v. Nebraska Penal and Correctional Complex, supra at 9. To the contrary, the classification decision turns on a discretionary assessment of a multiplicity of imponderables, entailing what a man is and has become rather than simply what he has done. Id. at 10. Thus, where as

here, the role of the classification decision-maker is predictive rather than factual and the governing procedural regulations do not in any way substantively limit his otherwise discretionary decision-making power, the conclusion must be that a complaint alleging a procedural irregularity during a classification hearing fails to state a claim for relief under 42 U.S.C. §1983. In this case, there is simply no substantive liberty interest protected by the Due Process Clause. Lombardo v. Meachum, supra; Bills v. Henderson, supra; Cofone v. Monson, supra; Sisbarro v. Warden, Massachusetts State Pennitentiary, supra. See also Daigle v. Hall, 564 F.2d 884 (1st Cir. 1977) and Four Certain Unnamed Inmates of MCI Walpole v. Hall, 550 F.2d 1291 (1st Cir. 1977) (holding that classification

regulations governing inmate transfers from the general prison population to segregation do not create a liberty interest requiring procedural due process).

B. THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT GUARANTEE THAT AN AGENCY WILL STRICTLY FOLLOW ITS PROCEDURAL RULES.

The Court of Appeals for the Ninth Circuit, relying primarily on this Court's decision in Accardi v. Shaughnessey, 347 U.S. 260, 267 (1954), held that state procedural rules, ipso facto, are Constitutionally protected liberty interests. Wakinekona v. Olim, supra, 664 F.2d at 712. In so holding, the court seemed to suggest that the Due Process Clause mandates strict adherence by an agency to its procedural rules even when those rules are not otherwise constitutionally mandated and when there

is no correlative substantive liberty interest contained in the regulations or otherwise. This holding is error.

In Accardi v. Shaughnessey, supra, this Court was faced with a federal habeas corpus action filed on behalf of an alien who had been denied an application for suspension of a deportation order under the provisions of §19(c) of Immigration Act of 1917. Admittedly deportable, the petitioner contended, inter alia, that the denial of his application was invalid since certain regulations, having the force and effect of law, and which governed the procedures to be followed in processing and passing upon an alien's application for suspension of deportation were not followed. Relief was denied by both the District Court and the Second Circuit Court of

Appeals. After granting certiorari, this Court reversed, holding that the petitioner's allegations concerning the violation of admittedly valid regulations did indeed state a claim and warranted a hearing in the District Court. Accardi v. Shaughnessey, supra at 268.

For a time, it was thought that Accardi and its progeny[7/] stood for the proposition that compliance by an agency with its

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7/ Service v. Dulles, 354 U.S. 363 (1957) (federal declaratory judgment action in which this Court invalidated the Secretary of State's dismissal of an employee where regulation requiring approval of the Deputy Undersecretary and consultation of full record were not satisfied); Vitarelli v. Seaton, 359 U.S. 535 (1959) (federal declaratory judgment action in which this court relying on Service v. Dulles, supra, invalidated the dismissal of an Interior Department employees where regulations governing hearing procedures for national security dismissals were not followed).

procedural regulations was mandated by the Constitution. Wakinekona v. Olim, supra, 664 F.2d at 712. Massachusetts contends that such an interpretation of Accardi is erroneous.

In Accardi, the question before the Court did not involve a state created liberty interest. Nor was it a case concerning a federally created liberty interest. Rather, as this Court clearly stated in its opinion:

> "The crucial question [was] whether the alleged conduct of the Attorney General deprived the petitioner of any of the rights guaranteed him by the statute or by the regulations issued pursuant thereto." [emphasis added] 347 U.S. at 265.

Thus, it should have been obvious that Accardi had nothing at all to do with Constitutional law and procedural due process.

Any doubt about this interpretation of Accardi was finally set aside in Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 (1978). In that case, a medical student who had been dismissed from the University of Missouri-Kansas City Medical School for academic reasons filed suit under 42 U.S.C. §1983, alleging, among other constitutional violations, that she had not been accorded procedural due process prior to dismissal. On certiorari to the United States Supreme Court following a jury trial in the district court where it was determined that the claimant had been afforded all of her rights under the Fourteenth Amendment, this Court stated:

> "Respondent also contends that petitioners failed to follow their own rules respecting evaluation of medical students and that

this failure amounted to a constitutional violation under Service v. Dulles, 354 U.S. 363 (1957). We disagree with both respondent's factual and legal contentions. As for the facts, the record clearly shows that the school followed its established rules, except where new rules had to be designed in an effort to further protect respondent, as with the practical "appeal" that petitioners allowed respondent to take. The District Court specifically found that "the progress status of [respondent] in the medical school was evaluated in a manner similar to and consistent with the evaluation of other similarly situated students, with the exception that [respondent's] docent went to even greater lengths to assist [respondent] in an effort for her to obtain her M.D. degree, than he did for any of his other students." App. 45. As for the legal conclusion that respondent draws, both Service and Accardi v. United States ex rel. Shaughnessy, 347 U.S. 260 (1954), upon which Service relied, enunciate principles of federal

> administrative law rather than of constitutional law binding upon the States." 435 U.S. at 93, n.9.

This Court ultimately agreed with the District Court's finding in Accardi that the student had, as a factual matter, been afforded adequate procedural due process prior to dismissal. Nevertheless, the only doctrine that emerges from the case is that while compliance with agency rules is certainly a desirable result, it does not follow that in all cases where deviations from procedural rules are alleged, a constitutional question is presented. The duty to enforce an

agency regulation is most evident only when compliance with the regulation is independently mandated by the Constitution or federal law. United States v. Caceres, 440 U.S. 741, 749 (1979). Compliance with procedural rules is not, in all cases, however, mandated by the Constitution.

The case of Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, supra, relied upon by the Ninth Circuit, is not to the contrary. In that case, this Court found that the statutory provisions governing parole release in the State of Nebraska created substantive limitations on the decision-maker's power to refuse to grant a parole permit. It did not purport to announce a new rule of constitutional law that agencies who decline to follow their procedural rules

or err in their application violate the aggrieved person's right to due process and thus become individually liable under 42 U.S.C. §1983. As this Court remarked in Greenholtz:

> Respondents emphasize that the structure of the provision together with the use of the word "shall" binds the Board of Parole to release an inmate unless any one of the four specifically designated reasons are found. In their view, the statute creates a presumption that parole release will be granted, and that this in turn creates a legitimate expectation of release absent the requisite finding that one of the justifications for deferral exists. We can accept respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection. However, we emphasize that this statute has unique structure and language and thus whether any other state statute provides a protectable entitlement must be decided on a case-by-case basis." 442 U.S. at 13.

Massachusetts submits that failure to reverse in this case will result in an unnecessary proliferation of prison transfer cases in federal court since there would be created a new constitutional rule requiring states to adhere strictly to any and all procedural rules promulgated by them. This would, of course, require the Court to depart from its traditional due process liberty interest analysis and have serious ramifications both within and without the correctional sphere of state administration. While adherence to procedural rules is certainly desirable, every deviation from state procedures cannot be viewed as a federal constitutional violation.

This Court has already noted that not every tort claimed to have been committed by prison officials

constitutes a constitutional violation cognizable under §1983. Parrott v. Taylor, 451 U.S. 527, 543-544 (1981). Similarly, not every violation of state procedural rules, unless the rule is independently determined to be mandated by the Constitution following application of the traditional due process equation, can be deemed a constitutional violation. A holding to the contrary would only serve to dangerously shackle prison officials in carrying out one of the most vexing of all state responsibilities - that of operating a penological institution. Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 137 (1977) (Burger, C.J., concurring).

This controversy is really nothing more than another example of a long line of cases brought in federal court

raising questions concerning the authority of a state to regulate and administer matters peculiarly local in nature. Id. at 136, 137. Federal courts, however, are not equipped by experience or otherwise to "second guess" the decision of state legislatures and administrators in the sensitive area of prison administration except in the most extraordinary circumstance. Id. at 136. The Due Process Clause must not be placed astride of the day-to-day functioning of state prisons. Meachum v. Fano, supra at 228-229. Federal court judges should not sit to supervise state prison administration. Id.

The very nature of due process negates any concept of inflexible procedures universially applicable to every imaginable situation. Arnett v.

Kennedy, 416 U.S. 134, 155 (1974), citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). Section 1983, like the habeas corpus proceeding in Accardi, was enacted for the purpose of enforcing and redressing constitutional and federal rights, not to transfer to the federal courts control over all executive decision-making. Accardi v. Shaughnessey, supra at 269 (Jackson, J., dissenting). Such an interpretation of §1983 would unwisely, if not improperly, thrust upon the federal courts the task of reviewing every discretionary function of state executive officers. Id. at 271. Moreover, it is well settled that decisions of the Executive Branch, however serious, do not automatically invoke due process protection; there simply is no guarantee that all executive decision-making must

comply with standards to assure error-free determinations. Greenholtz v. Nebraska Penal and Correctional Complex, supra at 8. (citing Meachum v. Fano, supra at 225; Montanye v. Haymes, supra; and Moody v. Daggett, 429 U.S. 78, 88, n.9 (1976). Thus, it is axiomatic that not every violation of state law by state officials acting under color of state law constitutes a violation of section 1983. Satterfield v. Clark, 514 F.Supp. 1323 (M.D. Ala., 1981); State of Missouri, ex rel. Gore v. Wochner, 620 F.2d 183 (8th Cir. 1980); German v. Killeen, 495 F.Supp. 822 (E.D. Michigan 1980).

C. TO THE EXTENT THIS COURT HOLDS THAT PROCEDURAL RULES CREATE A PROTECTED LIBERTY INTEREST, A DISTINCTION MUST BE MADE BETWEEN RULES WHICH ARE ADJUDICATORY AND THOSE WHICH ARE INVESTIGATIVE.

Wakinekona would contend that all procedural rules, whatever their nature

or purpose, are per se, protected by the Due Process Clause. To the extent this Court is inclined to agree, Massachusetts would urge that a distinction be drawn between procedural rules which are adjudicatory and those which are investigative.

In the past, this Court has attached great significance to the nature and purpose of procedural rules when considering remedies for non-compliance. For example, in United States v. Caceres, 440 U.S. 744 (1978), the Court was unwilling to mandate the suppression of certain evidence derived from an electronic surveillance on due process grounds, despite the fact that the information had been obtained in direct violation of mandatory federal regulations governing eavesdropping. The Court stated:

> "Nor is this a case in which the Due Process Clause is implicated because an individual has reasonably relied on agency regulations promulgated for his benefit and has suffered substantially because of their violation by the agency." 440 U.S. at 753.

Thus, where procedural rules are intended only to facilitate the development of relevant factual information for the decision-maker, as are classification regulations, no due process rights are affected. Moreover, it is well settled that as a general principle, it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules which may have been adopted for the purpose of fostering the orderly transaction of business. See American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970).

Prison transfer decisions and questions of parole release are very different from those concerning the revocation of parole and probation as well as prison discipline. The procedural rules governing classification and parole eligibility are designed only to facilitate the accumulation of an amalgam of elements, some factual but many of which are purely subjective and often based only on experience with the difficult and sensitive task of inmate placement. On the other hand, rules governing prison discipline and parole and probation revocation proceedings are directed towards eliciting purely historical facts in a quasi-judicial manner. Unlike the revocation decision, however, in prison placement there is no given set of facts which, if shown, would

mandate a decision one way or another. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, supra at 10, 11.

Prison placement in Hawaii does not depend upon an adjudication of historical facts. The classification boards do not purport to exercise a quasi-judicial function. Rather, their purpose is only to assist the decision-maker so that he can make an informed decision. Such boards do not guarantee the correctness of that decision. Therefore, to the extent this Court is inclined to hold that procedural rules are constitutionally protected, it must limit its holding to those rules which govern an adjudicatory process and exclude from the decision procedural regulations, like the classification regulations in this case,

which are designed to be purely investigative.

D. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO ADOPT THE INTREPRETATION OF THE REGULATIONS BY THE HIGHEST COURT OF THE STATE OF HAWAII.

It is well settled that property and liberty interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The sufficiency of a claim of entitlement must therefore be decided by reference to state law. Bishop v. Wood, 426 U.S. 341, 344 (1976). Moreover, when a state has interpreted a regulation in a particular way, as the highest court of Hawaii has done in this case, that construction must be accepted by a

federal court unless it is unreasonable. Id. at 346.

Important notions of federalism underlie this concept. To permit a federal court to simply disregard an informed and reasonable interpretation by the highest court of a state would substantially undermine this principle. In this case, because the Ninth Circuit Court of Appeals did not find the state court's construction of the Hawaii regulations unreasonable, the lower court decision must be reversed.

CONCLUSION

For the reasons stated above, the Commonwealth of Massachusetts, as amicus curiae, respectfully urges that the decision of the lower court be reversed.

Respectfully submitted,

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